5, 1990).

In 1990, House filed a second state post-conviction petition, in which he again asserted an ineffective assistance of counsel claim. The trial court summarily denied post-conviction relief, agreeing with the State that all of the issues presented had either been previously determined in the first post-conviction proceeding or waived.[1] On appeal, the Tennessee Supreme Court affirmed, holding that "[t]he issue of ineffective assistance of counsel was . . . determined on the merits at the initial proceeding and the trial court did not err in dismissing this second post-conviction petition without a hearing." *House v. State*, 911 S.W.2d 704, 711 (Tenn. 1995).

III. Federal Habeas Proceedings — District Court

House initiated federal habeas corpus proceedings under 28 U.S.C. § 2254 in September 1996. Among his 56 claims were numerous allegations of ineffective assistance of counsel. In June 1998, the district court granted summary judgment in favor of the Warden on all but four of House's claims.[2] As to those four claims, the

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[1]Under Tennessee law in effect at the time of House's state post-conviction proceeding, the scope of a hearing in state post-conviction proceedings "extend[ed] to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined." Tenn. Code Ann. § 40-30-111 (1990) (repealed 1995). A ground for relief was held to be "previously determined" if a court of competent jurisdiction "has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a) (1990) (repealed 1995). A ground for relief was "waived" if the petitioner "knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-112(b)(1) (1990) (repealed 1995). By law effective May 10, 1995, the Post-Conviction Procedure Act was rewritten and replaced in its entirety by 1995 Public Chapter 207, § 1 (now codified at Tenn. Code Ann. § 40-30-101 et seq. (2003)).

[2]Each of the four remaining claims involved allegations of ineffective assistance of counsel, specifically: (1) ineffective assistance of trial counsel for failure to adequately investigate guilt innocence; (2) ineffective assistance of trial counsel for failure to call all available witnesses that would have benefitted the defense; (3) ineffective assistance of trial counsel for failure to adequately investigate mitigating circumstances; and (4) ineffective assistance of trial

district court further found that petitioner's DNA evidence related to the semen stain did not undermine any of the three aggravating circumstances found by the jury and rejected House's claim that he was "innocent of the death penalty." (Pet. App. 133-34)

IV. Federal Habeas Proceedings — Sixth Circuit Court of Appeals

On appeal to the Sixth Circuit, House asserted only two arguments, both of which related solely to the district court's procedural default determination: (1) Is a state procedural bar "firmly established and regularly followed" or applied "evenhandedly to all similar claims," where the intermediate state court of appeals rules that the alleged bar does not apply to the claims at hand, and where a higher court, on reversing that ruling, states that no clear rule has previously been applied? and (2) Assuming that Mr. House was required to establish "actual innocence" in order to obtain merits consideration of the constitutional errors infecting his judgment of conviction and sentence, did he meet that burden and is he entitled to relief?

On March 11, 2002, a three-judge panel affirmed the judgment of the district court in a 2-1 decision. *House v. Bell*, 283 F.3d 737 (6th Cir. 2002) (opinion withdrawn and vacated). That opinion was vacated on April 19, 2002, when the Sixth Circuit *sua sponte* ordered en banc rehearing. Following supplemental briefing and oral argument, the court decided, by a vote of 6-5, to hold House's case in abeyance while it certified three questions to the Tennessee Supreme Court, the stated purpose being "to ascertain whether there remains a 'state avenue open to process . . . [House's] claim' [of actual

innocence] in this case." *House v. Bell*, 311 F.3d 767 (6th Cir. 2002), *cert. denied*, 539 U.S. 937 (2003)). When the Tennessee Supreme Court declined to answer the questions certified on November 24, 2003, the case again returned to the Sixth Circuit for consideration of the two issues raised by House in his briefs to that court. *See supra* p. 9.

On October 6, 2004, the en banc Sixth Circuit affirmed the judgment of the district court denying federal habeas relief. The court first determined that federal habeas review of House's ineffective assistance claims was barred by an adequate and independent state-law ground. Having found House's ineffective assistance of counsel claims to be procedurally defaulted, the court then turned to his contention that the failure to consider the merits of his claim would result in a fundamental miscarriage of justice, *i.e.*, that a "constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime" under *Schlup v. Delo*, 513 U.S. 298 (1995). Because the district court conducted an evidentiary hearing at which contested evidence was presented, the court of appeals examined both the evidence and the district court's related factual findings before concluding that House had failed to show that it is more likely than not that no reasonable juror would have convicted him. *Schlup*, 513 U.S. at 327. In performing that analysis, the court specifically deferred to the district court's resolution of credibility and factual disputes. *See Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001) ("We review the district court's conclusions of law in the application of

[§ 2254] de novo, and its factual findings are reversed only if they are clearly erroneous."). (Pet. App. 15)

As to focus areas of House's proof, the court of appeals concluded: (1) the fact that the semen found on the victim's clothes came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer; (2) the testimony of two women who allegedly heard Hubert Muncey's "confession" to the murder was not credible, nor was the content of the confession supported by any evidence in the Muncey home where the supposed altercation with the victim took place; (3) by contrast, the testimony of the victim's daughter, who was present in the home on the night of her mother's abduction and murder, was credible and consistent with her trial testimony; (4) the district court's conclusion that the "spillage [of the vials of blood] occurred after the FBI crime laboratory received and tested the evidence" was not clearly erroneous; and (5) House's theory that the blood on his blue jeans came from vials of blood gathered at Carolyn Muncey's autopsy and not from his physical attack in the course of her murder was based upon a speculative theory about enzyme degradation that was contradicted by other evidence in the record. The court of appeals specifically noted that the unchallenged testimony indicating that the blood stains and mud on the petitioner's jeans were mixed supports the conclusion that House committed the murder. (Pet. App. 15-16)

The court further noted that the following facts implicating House remain undisputed:

> [House] lied to investigators about his whereabouts on the night of the murder; he gave inconsistent versions of the origins of the scratches and bruises on his hands and arms; he was seen near where the body was discovered on the day after the murder; he lied about what he was wearing on the night of the murder; blue jeans belonging to House, spattered with blood mixed with mud, were found at the bottom of Ms. Turner's laundry hamper; House has a deep voice and Laura Muncey testified that the man who came to the trailer on the night of the murder had a deep voice; and, according to Ms. Sutton [the State's blood spatter expert at the federal evidentiary hearing], the blood and mud found together on House's blue jeans had been mixed together, which "certainly eliminates the possibility of any stains being created by contamination in an evidence container."

(Pet. App. 15)

The court of appeals concluded that, "[d]espite his best efforts" in mounting a "concerted attack on his conviction," the "case against House remains strong." (Pet. App. 15-16) "We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." (Pet. App. 16)

ARGUMENT

I. CERTIORARI IS NOT WARRANTED BECAUSE THE SIXTH CIRCUIT'S ANALYSIS OF PETITIONER'S GATEWAY INNOCENCE CLAIM IS CONSISTENT WITH THIS COURT'S DECISION IN *SCHLUP V. DELO* AND FULLY SUPPORTED BY THE FEDERAL AND STATE COURT RECORDS.

Petitioner seeks certiorari review of the decision of the Sixth Circuit affirming the district court's dismissal of his federal habeas corpus petition. He specifically faults the Sixth Circuit's refusal to allow revival of his procedurally defaulted ineffective assistance of counsel claims based upon the "miscarriage of justice" exception enunciated by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995). He contends that he presented to the district court a "compelling case of actual innocence" warranting review of his defaulted claims. (Pet., p. 16) To bolster his case for review, House asserts that the circuit courts of appeals have taken divergent approaches in analyzing *Schlup* gateway claims of "actual innocence" and that clari. :ation of *Schlup*'s "no reasonable juror" standard is needed. (Pet., pp. 17-20)

Certiorari is not warranted in this case, however, because the Sixth Circuit's analysis fully comports with this Court's decision in *Schlup* and correctly deferred to factual and credibility determinations made by the district court — sitting both as trier of fact at the federal evidentiary hearing and as a putative "reasonable juror" for purposes of *Schlup* — that were not clearly erroneous in light of the evidence presented. Under *Schlup*, a petitioner does not meet the threshold requirement to pass through the innocence gateway "unless he persuades the district court that, in light of the new

evidence, *no juror, acting reasonably*, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329 (emphasis added). *Schlup* requires more than just the presentation of additional evidence purporting to establish a prisoner's innocence. For, as Justice O'Connor observed in her concurring opinion in *Herrera v. Collins*, 506 U.S. 390, 423 (1993), "when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism. . . . [and] are suspect, produced as they were at the 11th hour with no reasonable explanation for the nearly decade-long delay." To pass through the *Schlup* gateway, the evidence presented must be both reliable and credible. *Schlup*, 513 U.S. at 324. And where, as in this case, that evidence is sharply contested in an evidentiary proceeding, a district court's credibility determinations are critical to determining whether a petitioner has met the burden imposed by *Schlup*.

Here, as the district court concluded, the evidence presented by House to support his claim, far from demonstrating his actual innocence, was countered and undermined in virtually every respect by opposing evidence presented by the State at the evidentiary hearing as well as the undisputed facts established at House's original trial. Indeed, the three primary components of House's case for "actual innocence" — the blood evidence, accounts of a drunken "confession" by the victim's husband, and House's version of the events on the night of the murder — were rejected by the district court as incredible, inconsistent with the uncontroverted evidence at trial, ebutted by other

expert and/or lay testimony presented in the federal evidentiary hearing, or some combination of all three. (Pet. App. 131-32) Moreover, the court of appeals' analysis of the issues before it was wholly consistent with this Court's precedent.

Because federal habeas review of House's ineffective assistance of counsel claim was barred by an adequate and independent state law ground, he was forced to look to the only exception available to him to revive his procedurally defaulted claim — that the failure to adjudicate his constitutional claim would result in a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 321 (1995). To ensure that the miscarriage of justice exception remains "rare" and would only be applied in the "extraordinary case," this Court explicitly tied the exception to the petitioner's actual innocence. *Id.* Thus, unless a petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial," "even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup*, 513 at 316.

To establish a miscarriage of justice, a petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Id., at 321. To satisfy this heavy burden, a petitioner "must support his allegations of constitutional error with new *reliable evidence* — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial." *Id.*, at 324 (emphasis added). The Sixth Circuit both

recognized and applied this standard in its analysis of House's claims. (Pet. App. 8, 15-16)

By definition, the *Schlup* standard for "actual innocence" cannot be met where, as in this case, the evidence of innocence is sharply contested and particularly where factual disputes and credibility questions are resolved *against* the petitioner by the trier of fact viewing the evidence and testimony in the first instance. The Sixth Circuit majority properly recognized that fact. The dissenting opinion did not. Indeed, the dissenting opinion was able to cast this case as the "rare or extraordinary case" of innocence only by assuming the truth of testimony and evidence that had been specifically discounted by the district court based upon that court's common sense assessment of the record as a whole.[4]

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[4]Likewise, House's petition to this Court is replete with affirmative statements of "fact" concerning the significance of the proof in the district court that are inconsistent with the factual determinations made by the district court itself. For example, House claims that "[p]owerful new evidence of innocence, including DNA evidence, proves that [he] was wrongly convicted of murder" (Pet., p. 2), a contention rejected as a matter of fact by both the district court and the Sixth Circuit. House claims to have been "cleared by DNA evidence, other scientific evidence, indisputable physical evidence and multiple eyewitness accounts." (Pet., p. 4) But even House admits there were no eyewitnesses to the murder (Pet., p. 5), and the district court specifically rejected his claim that the other evidence presented, scientific or otherwise, demonstrated his innocence of murder or of the death penalty. (Pet. App. 130-33) House claims to have "demonstrated that all of the physical evidence linking him to the crime . . . was either non-existent or patently unreasonable" (Pet., p. 16), a conclusion that has no support in the findings of the federal courts reviewing his claims. His contention, that "[p]ost-conviction testing of the blood evidence established that the victim's blood ended up on House's clothing . . . because either shoddy packaging allowed the blood to spill or two law enforcement agents deliberately placed the blood onto the clothing during transportation to labs" (Pet., pp. 17-18, 30), is patently inconsistent with the district court's finding that any spillage occurred after FBI laboratory had received and tested the evidence. (Pet. App. 131) In short, House's argument in support of certiorari is largely based on an exaggerated view of the evidentiary significance of the evidence without regard to the district court's assessment of its credibility and reliability in view of the record as a whole.

A habeas court reviewing an assertion of actual innocence does not write on a clean slate. *Cf. Barefoot v. Estelle*, 463 U.S. 880 (1983) ("Federal courts are not forums in which to relitigate state trials."); *Herrera v. Collins*, 506 U.S. 390 (1993) ("[I]n state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant); *Wainwright v. Sykes*, 433 U.S. 72 (1977) ("Society's resources have been concentrated at [the state trial] in order to decide, within the limits of human fallibility, the question of guilt or innocence of a crime."). The proper mode of analysis to be employed in assessing "new evidence" of innocence was described most precisely by Chief Justice Rehnquist in his dissenting opinion in *Schlup*:

> [T]he habeas court analyzing an "actual innocence" claim is faced with a body of evidence that has been supplemented since the original trial. The reviewing court must somehow predict the effect that the new evidence would have had on the deliberations of reasonable jurors. It must necessarily weigh this new evidence in some manner, and may need to make credibility determinations as to witnesses who did not appear before the original jury. This new evidence, however, is not a license for the reviewing court to disregard the presumptively proper determination by the original trier of fact.

Schlup, 513 U.S. at 340 (Rehnquist, C.J., dissenting).

Nor does the decision of the Sixth Circuit conflict with the decisions of other circuits on the same question. Indeed, many of the cases cited by petitioner are squarely in line with the Sixth Circuit's analysis in this case. For example, in *Fairman v. Anderson*, 188 F.3d 635 (5th Cir. 1999), the Fifth Circuit's determination that an eyewitness account of the murder was sufficient to demonstrate a gateway innocence claim under

Schlup was directly contingent upon the district court's "crucial credibility determination that [the witness] gave a trustworthy eyewitness account" in his testimony in the federal evidentiary hearing. *Id.* at 645. *Accord Wilkerson v. Cain*, 233 F.3d 886, 893 (5th Cir. 2000) ("The district court must hold an evidentiary hearing to assess the newly introduced [witness recantation] affidavits because there are reasons to doubt their reliability.").

In *Jaramillo v. Stewart*, 340 F.3d 877 (9th Cir. 2003), the Ninth Circuit reversed the decision of the district court dismissing the petitioner's habeas petition on grounds of procedural default and remanded the case to the district court to perform precisely the same analysis conducted by the district court in House's case — to determine whether the petitioner had presented sufficient *credible* evidence of actual innocence to excuse the procedural default of his constitutional claim. Although the court found that the new evidence, if credible, would demonstrate a miscarriage of justice under *Schlup*, it correctly concluded that "[t]here remains a question of the credibility of the proffered evidence. . . . The district court is in the best position to observe the witnesses . . . together with the other evidence available, and to make the ultimate credibility determinations." *Id.* at 883. The Ninth Circuit's rationale for remand is entirely consistent with the deference accorded the district court's findings in this case by the Sixth Circuit.

Petitioner's reliance on the decision of the Third Circuit in *Mattis v. Vaughn*, 80

Fed. Appx. 154, 2003 WL 22070528 (3rd Cir. 2003), as demonstrating confusion among the circuits is misplaced and improper, because the Third Circuit specifically designated its opinion in that case as not precedential. Likewise, petitioner's reliance on purportedly conflicting Sixth Circuit decisions lends no support to his petition to this Court, since intracircuit conflicts are a matter for en banc correction, not intervention by this Court on certiorari review. *Compare* Sup. Ct. R. 10(a) (certiorari warranted if a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter") *with* Fed. R. App. P. 35(a) (en banc hearing warranted if "necessary to secure or maintain uniformity of the court's decisions").

In sum, petitioner's contention that there exists confusion among the circuits in application of the *Schlup* gateway standard is simply not borne out by the cases he cites. The fact that courts may reach different results based upon their analyses of different evidence does not demonstrate a circuit split concerning the basic rule in *Schlup*. Because the Sixth Circuit properly concluded that House failed to demonstrate a fundamental miscarriage of justice as defined by this Court in *Schlup*, certiorari is not warranted under Sup. Ct. Rule 10(a).

II. CONSIDERATION BY THIS COURT OF A SUBSTANTIVE INNOCENCE CLAIM UNDER *HERRERA V. COLLINS* IS NOT WARRANTED BECAUSE THE QUESTION WAS NEVER PRESENTED TO, OR PASSED UPON BY, THE SIXTH CIRCUIT.

Following the lead of the dissenting opinion, petitioner asserts that certiorari is warranted to provide "clarification of the standard for freestanding claims of actual innocence" under *Herrera v. Collins*, 506 U.S. 390 (1993). In *Herrera*, this Court assumed — but only "for the sake of argument" — that "in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.* at 417. Subsequently, in *Schlup*, the Court underlined the difference between a "substantive *Herrera* claim," under which the petitioner would have to produce evidence that "unquestionably establish[es] . . . [his] innocence" of the crime, 513 U.S. at 316-17, and a "procedural" or "gateway" claim of innocence, which "does not by itself provide a basis for relief," *id.* at 315, but is asserted to obtain federal review of otherwise procedurally defaulted claims.

Pointing to statistics outside the record of this case, which purport to show that "the actually innocent have been freed from death row in ever increasing numbers," House urges this Court to "announce a standard for *Herrera* claims" to "guide courts presented with freestanding innocence claims in capital cases." (Pet., p. 31, 33) However, House himself presented to the courts below only a gateway innocence claim under *Schlup*, not a substantive *Herrera* claim. Thus, even assuming a substantive

innocence claim would present a cognizable basis for habeas relief (an assumption contrary to the decision in *Herrera* itself), exercise of this Court's certiorari jurisdiction to consider the standard for assessing such a claim would not be appropriate, because the issue was never presented or passed upon in the court below.

This Court has "stated, repeated and reiterated the general rule that precludes a grant of certiorari when the question presented was 'not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 58 & n.3 (1992) (Stevens, J., dissenting); *see also Duignan v. United States*, 274 U.S. 195, 200 (1927) ("This court sits as a court of review."). House raised only two issues in his appeal to the Sixth Circuit, both of which related solely to the district court's procedural default determination on his ineffective assistance of counsel claim: "(1) whether the Tennessee state courts applied the state waiver rule in such a way t it constituted an adequate and independent state ground that procedurally defaulted his ineffective assistance claims; and (2) whether, if his ineffectiveness claims were procedurally defaulted, he had made a sufficient showing of his actual innocence of the crime, permitting him to revive them." (Pet. App. 6) The Sixth Circuit specifically limited its determination to those two issues. (Pet. App. 1-2) ("House has limited his brief to a discussion of only two claims . . . . Having considered the arguments of the parties regarding the *two claims that are before us*, we affirm the district court's denial of the writ for the reasons set forth below.") (emphasis added).

Likewise, petitioner's application for a certificate of appealability presented only

a gateway innocence claim under *Schlup*: "[w]hether the District Court erred in finding that Mr. House had not established entitlement to proceed on his claims of guilt phase error . . . *under the 'actual innocence' exception to the procedural bar rule*. . . ." (emphasis added) A certificate of appealability "is a jurisdictional prerequisite" to appellate review of habeas claims. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 123 S.Ct. 1029, 1039 (2003) ("The COA statute establishes procedural rules and requires a threshold inquiry into whether a circuit court may entertain an appeal"). In a habeas case, a court of appeals may certify for appeal only those issues with respect to which "*the applicant* has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (emphasis added). The court is further required to "indicate which *specific* issue or issues" raised by the applicant satisfy that required showing. 28 U.S.C. § 2253(c)(3) (emphasis added). House specified only two issues in his application to the Sixth Circuit, and, since he did not even attempt to make the showing required by § 2253(c)(2) as to any other issues, the court of appeals could not have found that he had met his burden as to other issues.

Even if House had included a freestanding actual innocence claim in his application for a certificate of appealability, he could not have succeeded in making a "substantial showing of the denial of a constitutional right" with respect to such a claim, as he would have been required to do by 28 U.S.C. § 2253(c)(2). *Herrera* itself makes clear that "[c]laims of actual innocence based on newly discovered evidence have never

been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . . [F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact." *Herrera*, 506 U.S. at 400. While *Herrera* hypothesized "for the sake of argument" that the Constitution might forbid the execution of one who proves his factual innocence, this Court has never held that such a constitutional right exists.

Finally, even if a *Herrera* claim had been properly certified and presented to the Sixth Circuit, House still would not be entitled to relief. The hypothetical innocence claim discussed by the Court in *Herrera* has three essential components: (1) that the petitioner is under a death sentence; (2) that the petitioner makes a "truly persuasive" demonstration of actual innocence of the capital offense after trial; *and* (3) that there is no state avenue open to process such a claim. *Herrera*, 506 U.S. at 417. Only the first of these components is satisfied in this case. As to the second, the factual findings of the district court, affirmed by the Sixth Circuit, concerning the credibility and weight to be accorded House's new evidence defeat any claim that he has mounted a "truly persuasive" demonstration of innocence. More importantly, however, under a plain reading of *Herrera*, the absence of state remedies is an element of a substantive innocence claim and a condition precedent to its assertion in federal habeas proceedings. *See Id.* ("[I]n a capital case a truly persuasive demonstration of 'actual innocence' made after

trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief *if there were no state avenue open to process such a claim.*") (emphasis added). Conversely, the *availability* of state remedies, as a matter of law, defeats any such claim. In *Herrera*, this Court specifically identified executive clemency as the "traditional remedy for claims of innocence based on new evidence." *Id.*, at 416-17. Because that remedy is unquestionably available to House under Tennessee law, he would be barred from asserting a substantive *Herrera* claim as a basis for habeas corpus relief even if such a claim were held to be cognizable. *See* Tenn. Code Ann. § 40-27-101 *et seq.* (2003) (Tennessee Governor has broad power to grant reprieves, commutations, pardons, and exonerations in all criminal cases after conviction).

Because House never properly presented a substantive innocence claim to the Sixth Circuit, and that court's decision does not rest upon the disposition of any such claim, certiorari is not warranted under Sup. Ct. Rule 10.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief in Opposition has been forwarded by First-Class U.S. mail, postage prepaid, on this the 6th day of May, 2005, to:

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I further certify that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
MAY 17 2005
CLERK

No. 04-8990

DISTRIBUTED
MAY 18 2005

In the Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent urges this Court to deny Paul House's petition even though *every* judge on the Court below, sitting *en banc*, concluded that Mr. House had established a colorable claim of actual innocence before the district court. *House v. Bell*, 386 F.3d 668, 684 (6th Cir. 2004)("Indeed, it is fair to say that he has presented a colorable claim of actual innocence"); *id.* at 690, Merritt, J., dissenting ("He has clearly shown both that a reasonable juror would have a substantive and serious doubt as to his guilt and that the cumulative evidence is insufficient to enable a rational juror to convict House or sentence him to death for the murder of Carolyn Muncey."). *See also, Schlup v. Delo*, 513 U.S. 298, 311 and 332 (1995)(adopting the *Carrier/Kuhlmann* standard). By the narrowest of margins, 8-7, however, the majority determined that Mr. House's evidence was not substantial enough to satisfy either *Schlup* or *Herrera*.

Respondent urges the Court to deny certiorari largely upon three points. First, it argues that the majority below properly deferred to district court fact-finding. We show that in several key respects, no such fact-finding occurred. Second, Respondent argues that the majority properly applied *Schlup*, and that there is no confusion below as to how *Schlup* is to be applied. We show that view is mistaken as well. Third, Respondent argues that the majority properly applied *Herrera*. Again we will show that the majority was mistaken and that certiorari is appropriate.

Paul House presented a compelling showing of innocence in the district court, a showing that satisfied the standards set forth in both *Schlup* and *Herrera*. But for the errors committed by the majority, he would have won review of his underlying claims. Without this Court's review, there is a very real chance that House will be executed.

The district court's fact finding wholly ignored ample record-based evidence of House's innocence and is not entitled the deference Respondent relies on.

Respondent claims in defense of the State of Tennessee's ongoing attempts to execute Mr House in terms of respecting state court and district court fact finding. He does nothing, however, to rebut the record evidence of Mr. House's innocence.

A. State court findings reached without consideration of new evidence are not entitled to deference.

Respondent, like the majority below, proffers a lengthy recitation from the direct appeal opinion as established facts requiring rebuttal. Both thereby ignore that neither the twelve persons who initially determined Mr. House's guilt, nor the Tennessee Supreme Court who reviewed the then-existing record to find evidence to support the jury's conclusion, were privy to the overwhelming evidence of Mr. House's innocence presented to the district court at the time they spoke so assuredly of the strength of the State's case for guilt. Accordingly, both also ignore *Schlup*'s directive that a court seeking to resolve a threshold claim of actual innocence consider all the evidence in the record, not just the evidence supporting the prosecution's theory of the case. *Schlup v. Delo*, 513 U.S. at 327-328.

B. Deference to district court findings is required only where the findings are actually factual and when they are not clearly erroneous.

The same disregard for the evidence in the district court record infects Respondent's allegation that the majority's decision is properly deferential to the district court finding of fact. Of the five district court holdings which actually are factual findings entitled to deference, the record shows three to be utterly unsupported by the evidence, and therefore clearly erroneous, and the remaining two are largely irrelevant to the *Schlup* inquiry in this case

Respondent, like the majority below, contends that the district court found that Mr. Muncey's two friends, Kathy Parker and Penny Lemer, who testified that he had confessed to them that he had murdered Ms. Wade were incredible. In fact, what the district court actually held was that it was, "not

impressed with individuals who wait over ten years to come forward with their evidence." Memorandum Opinion at 45 (Apx. 625). The distinction is critical. Kathy Parker's testimony expressly states that she did not wait "over ten years" to come forward with the evidence of Mr. Muncey's confession, but instead went to both local law enforcement the day after hearing the confession. Hearing Transcript 2/1/99 Vol.1, pp. 38-39, 44-45 (Apx. 844-845, 848-849). The district court's "finding" on this point is therefore clearly erroneous. The district court wholly ignored this fact. Respondent, like the majority below, also points to the district court's finding that the testimony of Mr. Muncey's daughter that she could not recall the furniture in the home being disturbed when she awoke to find her mother missing contradicts these two disinterested witnesses' account of Mr. Muncey's confession. The record reveals that neither Kathy Parker, nor Penny Letner, testified that Mr. Muncey had confessed to killing his wife in the home. Again, the district court's finding is clearly erroneous.[1]

Respondent contends that the majority properly defers to the district court's finding that any blood missing from the sample tubes taken during Ms. Muncey's autopsy escaped after Mr. House's blue jeans had been tested by the FBI. Respondent like the majority below, cannot point to a single piece of evidence which supports this finding and indeed there is no such evidence. Un-rebutted and un-impeached photographic and testimonial evidence before the district court show that the container in which the sample tubes were packaged had been inexplicably opened before arriving at the FBI Crime Laboratory. The testimony of FBI Agent Paul Bigbee demonstrates that more blood was missing from the sample tubes than the FBI would have used in testing. Finally, un-rebutted and un-impeached photographic evidence clearly reflect that the blood which did leak from the tubes after testing failed to

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[1]Not only are the district court's purported grounds for rejecting Parker and Letner's testimony devoid of support in the record, their testimony about Mr. Muncey's confession is corroborated by other substantial evidence of Mr. Muncey's guilt including, the consistency between the acts described in his confession and the nature of the victim's injuries, Mr. Muncey's long history of attacks on the victim, Mr. Muncey's attack on the victim the very night of her murder and his untruthful denial of seeing her that evening, and his attempt to secure a concocted alibi for the night of her murder.

account for three-fourths of a tube of missing blood. On yet another critical issue, the district court's finding is clearly erroneous.

Respondent also points to the district court's finding that Hubert Muncey Jr.'s daughter, Laura, was a credible witness when she testified at the federal evidentiary hearing. Respondent, however, relies upon only two aspects of Ms. Muncey's testimony, *i.e.*, that the home was not in disarray when she awoke to find her mother missing and that a person with a low voice had called to her mother from the road. As noted, the condition of the home was not relevant because no one testified that Mr. Muncey confessed to killing his wife in the home. As for the low voice calling from the road, there is no proof that this person was connected to the murder. Moreover, even if there were, Laura Muncey's testimony would exculpate Mr. House because she also stated that the person who had called to her mother had honked a car horn and the evidence at trial showed that Mr. House did not have an automobile on the evening of the murder.

Finally, Respondent places great importance on the district court's finding that Mr. House was not a credible witness when he testified about his whereabouts during the one and one-half hours he was gone from his girlfriend's trailer on the night if the murder. Contrary to Respondent's claim that this testimony was critical to Mr. House's case, whether he had a satisfactory alibi for that time period is of little significance. The record shows that Mr. House could not have physically accomplished all the acts he was alleged to have committed within that time frame. Moreover, unlike during a post-conviction federal habeas corpus hearing generally conducted according the Federal Rules of Civil Procedure, Mr. House could not have been compelled to testify before a jury at his own criminal trial[2].

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[2]Petitioner notes that, while immaterial, the district court's credibility finding is also clearly erroneous. Mr. House's testimony was identical to the statement he made to his girlfriend at a time he was not even a suspect in Ms. Muncey's murder and was corroborated by his muddy jeans (indicative of his flight through the woods), his separately discarded and non-blood stained tennis shoes, and the length of his absence from his girlfriend's trailer. The district court's observations of Mr. House's demeanor cannot justify its credibility finding, especially when that demeanor was at least partly the product of what was later discovered to be the symptoms of multiple sclerosis.

C. *Schlup* does not require a petitioner to disprove all evidence of guilt.

Much of what Respondent characterizes as factual findings are not factual findings at all, but the majority's improper application of *Schlup* to the facts developed in the district court. In each of these instances, Respondent, following the lead of the erroneous majority opinion, looks to whether equally credible evidence can be construed in such a way as to support conviction. This is not what *Schlup* requires. *Schlup v. Delo*, 513 U.S. at 330 ("Though the *Carrier* standard requires a substantial showing, it is by no means equivalent to the standard of *Jackson v. Virginia*, 443 U.S. 307(1979), standard that governs review of claims of insufficient evidence. The *Jackson* standard, which focuses on whether any rational juror could have convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction.").

In the most prominent of these "findings" the majority rejects the DNA evidence showing that Mr. House had not raped the victim because a hypothetical reasonable juror could have concluded that Mr. House merely lured the victim out of her home and killed her for some other reason unknown to this very day. This wholly ignores the case as the prosecution presented it to the jury. The prosecution unequivocally maintained throughout trial that Mr. House, who had been convicted of a prior sex crime, murdered Mrs. Muncey after raping her. Schlup requires a court to consider the case presented at trial in light of the newly discovered evidence through the eyes of a reasonable juror. *See Schlup*, 513 U.S. at 327-328; *Wilkerson v. Cain*, 233 F.3d 886, 889, 892 (5th Cir. 2000); *Paradis v. Arave*, 130 F.3d 385, 396 (9th Cir. 1997). Similarly, the majority rejects the testimony of Assistant Chief Medical Examiner Cleland Blake that the stains on Mr. House's blue jeans came from the autopsy blood samples by speculating that a reasonable juror could have concluded that the similarities in enzymatic degradation could have been result of the similar environmental forces despite the radically different conditions to which the jeans and autopsy samples had been exposed coincidently coming together to degrade the very same enzymes to the very same degree, or that some of the myriad of unidentified stains observed by law

enforcement when they first seized Mr. House's jeans could have actually been blood and could have actually come from the victim. Finally, and perhaps most astoundingly, the majority rejected the evidence that the only time blood could have become mixed with mud on Mr. House's blue jeans, as both parties agree is the case, is after they were seized by law enforcement. Again, the majority speculates that a juror could have concluded that (although there was no mud where the victim was killed, no mud where her body was found, and the only evidence of blood and mud coming in proximity to one another was when House's wet muddy jeans were taken by law enforcement to the FBI Crime Laboratory together with the sample tubes) Mr. House had fallen in a mysterious mud hole in the middle of the road as he ran the approximately 2 miles from his girlfriend's trailer to the Muncey home. *House v. Bell*, 386 F.3d at 685.

Contrary to Respondent's and the majority's views, *Schlup* does not require Mr. House to eliminate all evidence of guilt. The proper question is whether it is more probable than not that any reasonable juror would vote for conviction. It is an easy question in this case and one which even the majority would have answered in the negative had it understood its duties under *Schlup*. The appropriate inquiry under *Schlup* is whether any reasonable juror would have concluded that Mr. House suddenly arose from his girlfriend's trailer, ran over two miles in twenty minutes over hill and dale, in the middle of a moonless night, taking time out to stop to fall in a mud hole and pick himself back up, lured Ms. Muncey from her home for no reason whatsoever (because irrefutable DNA testing had eliminated the prosecution's only alleged motive), killed her, hid her body, and ran back to his girlfriend's trailer an hour and a half after he left. The Sixth Circuit majority erroneously substituted its own judgment for that of a reasonable juror weighing the trial evidence against Mr. House against the evidence presented at the hearing below. The district court and the Sixth Circuit majority concluded that the following evidence would have convinced a reasonable juror to accept this scenario: (1) Mr. House lied about where he was for that hour and a half; (2) he did not accurately describe the origin of bruises which were too old to

have any relevance to the crime, (3) the victim's daughter heard a man with a low voice driving a car (despite un-rebutted evidence showing that Mr. House was on foot that night) call out to her mother; and (4) Mr. House was seen on the day after the murder walking toward the home of a man whom he had just told his girlfriend he was going to try to find. The district court and the Sixth Circuit majority dismissed Mr. House's evidence that the only biological evidence linking him to the crime - the bloody jeans - were sullied due to law enforcement mishandling and or misconduct. They concluded that it may have been a coincidence that the container carrying sample tubes of blood from the victim's autopsy was opened during transit to be tested by two men who just happened to also have Mr. House's blue jeans and that it might have just been a coincidence that the same enzymes in liquid blood samples and Mr. House's blue jeans degraded in exactly the same manner when exposed to radically different environments (despite testimony to the contrary by the Assistant Chief Medical Examiner for the State of Tennessee). Finally, the district court and the majority ignored Mr. House's compelling evidence implicating an alternative suspect - Hubert Muncey Jr. - in the victim's murder: he had attacked his wife in front of a witness only hours before her death, lied about that attack to law enforcement, tried to arrange an alibi, and confessed to murdering her in a manner consistent with not only his history of spousal abuse, but also the injuries to her body. Yet, the lower courts failed to evaluate this evidence from the perspective of a reasonable juror presented with it. Thus, both the district court and the Sixth Circuit majority erred in contravention of *Schlup*. *Schlup v. Delo*, 513 U.S. at 327.

The United States Court of Appeals quite simply misapprehended its obligation to look at all of the record evidence undermining the evidence used to convict Mr. House and that affirmatively pointed to his innocence. By the narrowest of margins, it issued an *en banc* decision which other courts will look to for guidance, if not corrected. At the same time, it left an innocent man on Tennessee's death row despite a trial fraught with constitutional error with no hope that a jury of twelve of his peers will ever render a judgment based upon all of the facts now in the record. Moreover, as the Petition outlines in

detail at pages 25 through 28 the federal courts of appeals are split and have applied Schlup inconsistently to cases with indistinguishable facts. *Jaramillo* v. *Stewart*, 340 F.3d 877, 883 (9th Cir. 2003); *Wilkerson* v. *Cain*, 233 F.3d at 891; *Lucas* v. *Johnson*, 132 F.3d 1069, 1077-1078 (5th Cir. 1998). The Court should grant certiorari to clarify the "substantial miscarriage of justice" exception to the procedural bar rule under *Schlup*, to reverse an erroneous *en banc* opinion of the United States Court of Appeals for the Sixth Circuit which now has the potential to mislead every court presented with evidence of actual innocence, and to provide justice to an innocent man who has spent twenty years on Tennessee's death row for a crime he did not commit.

II. The *Herrera* issue was considered by the circuit court and is properly reviewed on Certiorari.

Respondent offers only the jurisdictional grounds why the Court should not take this exceedingly rare opportunity to clarify the extent and requirement of substantive claims of actual innocence in a case where six judges of a United States Circuit Court of Appeals opine that the Petitioner has established his right to immediate release from state custody. Respondent argues that, because the *Herrera* issue was not included in the certificate of appealability issued by the panel, the circuit court, and now this Court, lacks jurisdiction to consider this important question. The circuit court may *sua sponte* consider issues which were not included in the order granting the certificate of appealability. *Vilot* v. *Varner*, 373 F.3d 327, 337, at fn 13 (3rd Cir. 2004); *U.S.* v. *Morgan*, 244 F.3d 674, 674-675 (8th Cir. 2001). In this case, the circuit court did just that when it issued its opinion in *House* v. *Bell*, 311 F.3d 767 (6th Cir. 2002), *cert. denied* 539 U.S. 937 (2003). In fact, the circuit court's consideration of the *Herrera* issue was one of the subjects of Respondent's petition seeking certiorari review of that decision. There is no procedural or jurisdictional obstacle to the Court's consideration.

It has been well over a decade since *Herrera* was decided. The uncertainty of that decision has left the lower federal courts confused as to the standard for resolving substantive claims of actual

innocence or even whether such claims are cognizable in federal habeas corpus. Here, in this exceedingly rare case where the evidence of actual innocence is truly overwhelming and where the Tennessee Supreme Court, when specifically asked by the circuit court to identify the state court procedures available to Mr. House, has already refused to indicate whether it will correct the grievous errors they have committed over the past twenty years, this Court should not hesitate to state clearly whether persons who have completely eviscerated the State's case for guilt, and presented affirmative evidence of innocence may obtain federal habeas corpus relief.

As Justices O'Connor and Kennedy observed in *Herrera*:

> Regardless of the verbal formula employed--"contrary to contemporary standards of decency," *post*, at 876 (dissenting opinion) (relying on *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)), "shocking to the conscience," *post*, at 876 (relying on *Rochin v. California*, 342 U.S. 165, 172 (1952)), or offensive to a " 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' " *ante*, at 864 (opinion of the Court) (quoting *Medina v. California*, 505 U.S. 437, 445-446 (1992), in turn quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977))--the execution of a legally and factually innocent person would be a constitutionally intolerable event.

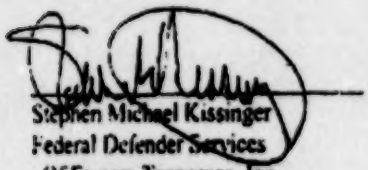
Herrera v. Collins, 506 U.S. 390, 419 (1993).

It is time to give effect and direction to the federal courts' power to prevent this constitutionally intolerable event.

CONCLUSION

Respondent's attempt to portray the majority's decision as nothing more than properly deferential to the factual findings of earlier courts is unavailing. Such deference is unwarranted except as to factual determinations which are not clearly erroneous. Furthermore, even with all due deference, the circuit court would have reached an opposite conclusion had it abided by the Court's holdings in *Schlup* and *Herrera*. Certiorari should be granted as to both questions.

Respectfully submitted.



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